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May 5, 2005

Mr. Corbin R. Davis, Clerk
Michigan Supreme Court
925 W Ottawa Street
Lansing, MI 48915

Re: ADM File No. 2003-62
Proposed Michigan Rules of Professional Conduct

Dear Mr. Davis:

The Court should *not* adopt Alternative B of proposed MRPC 4.2, which adds a "government lawyer" exception to the ban on direct communication with a person represented by counsel.

Alternative (B):
In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. ***This Rule does not apply to otherwise lawful investigative actions of lawyers employed by the government who are engaged in investigating and/or prosecuting violations of civil or criminal law.***

The proposal appears to be predicated on the notion that counsel representing a person whom the government wishes to investigate is merely a reluctantly tolerated impediment to the administration of justice, and that counsel must step aside and let the government do its job in the public interest.

Nothing could be further from the truth. It is private counsel that often stands alone to protect a suspect from government agents who cannot be relied upon to protect individual rights. The more noble the goal the more likely it is that the Constitution is seen as a mere technicality by government attorneys and the presence of counsel on the other side seen as an impediment to their efforts. Furthermore, even where government agents do not violate an investigative target's constitutional rights, the absence of private counsel can have serious consequences which the Rules of Professional

Conduct have long recognized to be unfair and improper. The existing rule is designed to prevent lawyers from taking advantage of uncounselled lay persons and to preserve the integrity of the lawyer-client relationship. ABA, Annotated Model Rules of Professional Conduct 424 (2nd ed, 1992); G.C. Hazard, Jr. & W.W. Hodes, *The Law of Lawyering* 730 (2nd ed, 1990). The Michigan Constitution's recognition of the right to fair treatment during government investigations, Const 1963, art 17, would be rendered nugatory if government lawyers could freely cajole, importune, entice, threaten, browbeat, beguile, and berate investigative targets outside the presence of opposing lawyers. Moreover, if this were truly a worthy idea, the proposal would have been so drafted as to equally apply to allow private lawyers to enjoy the same privilege with respect to government employees, agents, and officers. The very fact that such a one-sided proposal has been advanced by "government attorneys" should be recognized as proof positive that what is being sought is not a fine-tuning of the MRPC to better balance competing interests, but the acquisition of a unilateral advantage of momentous, far-reaching, and unjustifiable proportions. For those ideologically opposed to "big government", for those who have fought in the defense of freedom, as well as for those bound by oath, Const 1963, art 11, §1, to protect, preserve and defend our hard won liberties against government actions made with always the best of intentions, this proposal should be anathema.

It is not solely a matter of withholding information government might use to punish crime, prevent crime, or sanction civil violations, but of balancing the interest of targets, who are citizens also entitled to government protection with the general public interest. Morality demands, for example, that a target not be induced to put him- or herself in personal danger by informing on a violator without being apprised of the possible need to secure protection, which might range from promising the confidentiality of the informer's privilege, see Taylor, Googasian, Falk, *West's Michigan Practice Guide: Torts* ¶14:235 ff, pp. 14-84 ff (2005 ed), to protective custody or a witness protection program. The consequences to the target in ancillary "civil" proceedings of any statements made without consultation with counsel could far exceed potential criminal consequences, such as forfeitures, deportation, loss of licenses, loss of public housing, elimination of educational opportunities, loss of custody of children etc.

In *People v Bender*, 452 Mich 594 (1996), this Court recognized that Const 1963, art 1, § 17 requires the police to inform a person in custody, before interrogation, when retained counsel is immediately available for consultation.

In their opinions Justices Cavanagh and Brickley eloquently expressed the power of their positions.

In the majority opinion Justice Brickley forcefully observed:

> In my view, the rule we adopt today requiring police to inform suspects that counsel has been retained for them insures that our system of criminal justice remains accusatorial and not inquisitorial in nature. Perhaps more importantly, it demonstrates that experience has taught us that the good will of state agents is often insufficient to guarantee a suspect's constitutional rights [*Id*, p 623].

Justice Cavanagh, concurring, wrote:

> We recognize that the rule we announce today may decrease the likelihood that interrogating officers will secure a confession. However, this duty to inform is as necessary as other safeguards we have developed to protect a suspect's rights to remain silent and to counsel. As the United States Supreme Court stated in *Escobedo* [*v Illinois*, 378 US 478; 84 S Ct 1758; 12 L Ed 2d 977 (1964)]:
>
> > No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. [*Id* at 490] [*People v Bender*, *supra*, p 618-619; footnotes omitted].

Bender dealt with the narrow situation where a criminal suspect, undergoing custodial interrogation, was unaware that counsel had been retained for his defense. The proposed rule goes much further, promising to trample or eviscerate all attorney-client relationships where the client has the misfortune to be opposed by a government lawyer.

Note that the current rule, carried forward from the predecessor Code of Professional Responsibility, DR 7-104(A)(1), does not make information obtained in violation of its provisions inadmissible. Rather, it exposes the lawyer who chooses to advance his client's interests by such means to having to find another way to earn a living, depending on the seriousness with which the Attorney Grievance Commission and Attorney Discipline Board, the Supreme Court's own disciplinary arms, MCR 9.108(A) and 9.110(A), view such violations. Under the present rule, if a government lawyer were to speak with a person known to be represented, without opposing counsel's presence or permission, and thereby uncover a terrorist plot, prevent a felony, or bring a dangerous fugitive to justice, one expects that the Discipline Board would weigh the pros and cons and impose a less than maximum sanction. MCR 9.106. Giving government lawyers carte blanche to invade the attorney-client relationship, and concomitantly removing the need for a calculus of societal benefits against personal professional risk, can only lead to abuses the present system has held in check without destruction of the body politic.

The movement in our society has been and is away from giving government more power. From the 1986 tax reform act, wherein Congress reined in the IRS due to abuses of power, to the current debate over how to fix the excesses in the Patriot Act, the trend is to align ourselves with our founding fathers, who mistrusted any government which did not have limited powers that could be checked and balanced by an independent judiciary. Now is not the time, and this is not the cause, for the Michigan Supreme Court to launch itself upstream against the tides of history.

After all, from what is the right to counsel intended to protect us? Isn't it against the government? If government agents can talk to a person that has an attorney in civil or criminal investigations, what is the point of having an attorney – particularly for those in custody? Why should a target who has once recognized the need for counsel and exercised his right to counsel have to continue to respond to the government on their own, without the assistance of the counsel they know they need? The proposed rule is designed not to honor the request for counsel or the right to have an attorney, but is specifically designed to allow the government to avoid and circumvent it.

Alternative B would eviscerate the right to counsel. The right to suppress statements taken by the government in violation of a citizen's 5th and 6th amendment rights is not a sufficient guarantee of the right to have an attorney. It would effectively gut the rule of *People v Bender* and the protection to which Michigan citizens are entitled under the Michigan Constitution. Alternative B is simply bad law, bad policy, and bad government.

Sincerely,

James R. Neuhard
Director

C: Appellate Defender Commission
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